1994

Preface: Symposium on Pacific Rim Trade

Geoffrey R. Watson
The Catholic University of America, Columbus School of Law

ARTICLES

Preface

*Geoffrey R. Watson**

I. INTRODUCTION

This Symposium on trade in the Pacific Rim could hardly have been better timed. The Symposium took place just ten days before the U.S. Congress approved legislation implementing the North American Free Trade Agreement (NAFTA),[1] two weeks before the summit of the Asian-Pacific Economic Cooperation (APEC) group in Seattle, and a month before parties to the General Agreement on Tariffs and Trade (GATT)[2] reached agreement on the Uruguay Round of negotiations. Free trade has risen to the top of the American foreign policy agenda. Trade with the Pacific Rim in particular has received unprecedented attention from the Clinton Administration. Indeed, our Symposium caught the attention of President Clinton, who sent the participants a letter urging them to "remember the historical importance of expanding trade."[3]

---

* Assistant Professor of Law, University of Puget Sound School of Law; B.A. Yale College; J.D. Harvard Law School; Attorney-Adviser, U.S. Department of State, 1987-91.

1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 296.

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

3. The text of the President's letter reads as follows:

> I am pleased to send greetings to everyone gathered . . . for the University of Puget Sound School of Law Symposium on Pacific Rim Trade.
>
> America's economic growth and the world's economic growth depend as never before on the expansion of trade and the opening of new markets. In a rapidly changing global economy, all nations must cultivate international relationships in order to thrive and prosper. I commend you as participants for your interest in the expansion of trade among the economies of North America and Asia. I am particularly delighted that this conference is being held in Washington, a vibrant state whose residents well understand the benefits that increased commerce with our neighbors will bring. When the United States and the City of Seattle host the APEC leaders conference, I personally intend to

II. THE SYMPOSIUM

The Symposium meeting itself was convened on Friday, November 5, 1993, at Union Station in downtown Seattle. The meeting was divided into four panels, two in the morning and two in the afternoon. The two morning panels considered trade questions in the multilateral context—mainly GATT and NAFTA—while the afternoon panels focused on bilateral trade issues.

Each panel featured a distinguished group of presenters. The first panel addressed the question of Chinese membership in the GATT. I introduced the topic by providing an overview of the GATT. Professor Donald Clarke of the University of Washington School of Law followed by outlining some conceptual difficulties with Chinese membership.

The second panel took up NAFTA. I moderated a lively discussion among four presenters: Phillip Jones, chairman of the Washington Coalition for NAFTA; Professor Robert Benson of Loyola Law School in Los Angeles; Hillary Kaplan, Assistant General Counsel for PACCAR in Bellevue, Washington; and Robby Stern, head of the Washington Labor Coalition Against NAFTA. Mr. Jones and Ms. Kaplan defended NAFTA; Professor Benson and Mr. Stern attacked it. This panel was followed by lunch, during which Don Bonker, former Chairman of the Subcommittee on International Trade of the House Foreign Affairs Committee, spoke on trade policy generally. He outlined the history of U.S. trade policy in this century, and he argued for a policy of free and fair trade.

The third panel, moderated by Professor Kellye Testy of the University of Puget Sound School of Law, considered questions relating to trade with Japan. This panel included presentations by Professor Dan Fenno Henderson of the University of Washington School of Law, Michael Kawachi of Mayer, Brown and Platt in Tokyo, and David Walton of Perkins Coie in Seattle.

---

highlight the importance of Pacific Rim trade. As you debate the North American Free Trade Agreement and other important issues, I urge you to remember the historical importance of expanding trade. History shows us that global economic growth can happen only if we compete in, not retreat from, international markets. In a time of dynamic technological change and the expansion of democracy throughout the world, we must embrace the social and economic challenges before us. I am confident that by working together, we can create a more peaceful and prosperous world.

Best wishes for a productive and successful conference. Bill Clinton.

Letter from Bill Clinton, President of the United States, to *University of Puget Sound Law Review* (Nov. 3, 1993) (on file with the *University of Puget Sound Law Review*).

The fourth and final panel addressed questions arising out of trade with China, Hong Kong, and Taiwan. I served as moderator. The panelists were Dr. Robert Kapp, Chairman of the APEC conference; Jeffrey Kovar, Attorney-Adviser for East Asian and Pacific Affairs at the U.S. Department of State in Washington, D.C.; Randall Green, an aircraft contracts specialist at Boeing who also serves as Adjunct Professor of Law at the University of Puget Sound School of Law; and Heng-Pin Kiang of Perkins Coie in Seattle. Dr. Kapp described the agenda for the upcoming APEC conference in Seattle. Mr. Kovar and Professor Green discussed most-favored-nation (MFN) status for China. Mr. Kovar described the applicable legal framework that has been developed by the Clinton Administration; Professor Green argued for renewal of MFN status for China. Finally, Mr. Kiang described developments in bilateral trade with Taiwan and Hong Kong.

III. THE SYMPOSIUM ISSUE

This issue includes one article from each panel: Professor Clarke's article on whether China should become a member of the GATT, Professor Benson's article on NAFTA as "extremist ideology," Mr. Kawachi's article on securitization in Japan, and Professor Green's article on MFN status for China. In addition, the editors have included a spirited defense of NAFTA by Ms. Rebecca Reynolds Bannister. To set the stage, I offer a few comments on each article below.

A. GATT and China

GATT used to be one of international law's more obscure acronyms. That has changed over the past few years as the Uruguay Round of negotiations has raised the GATT to a political level in Europe and the debate on NAFTA has focused attention on the GATT here in the United States. But last December's agreement in the Uruguay Round means that the public will have to learn yet another acronym because the GATT is now being replaced with the World Trade Organization (WTO).[4]

Whatever the name, the GATT will remain the foundation for international trade law. Although originally signed by only

4. *See Uruguay Round Agreement Is Reached; Clinton Notifies Congress Under Fast Track*, Int'l Trade Rep. (BNA) No. 49, at 2103 (Dec. 15, 1993), *available in* LEXIS, BNA Library, INTRAD File (describing the new WTO).

a handful of Western states, it is now adhered to by over a hundred states from around the world. The Agreement stands for the principal of free trade and open markets; its avowed goal is the gradual reduction of trade barriers of all types. In particular, the GATT holds that trade should be nondiscriminatory—that each state party should accord to all other state parties the same treatment it gives the "most favored nation" with which it trades.[5] In addition, insofar as trade barriers continue to exist, the GATT evinces a preference for "transparent" trade barriers such as tariffs on imports—barriers that most clearly reveal how much additional cost is imposed on an importer.[6]

It is quite natural that China, with its rapidly expanding economy and its increasing volume of exports, should be interested in joining the GATT. It is equally natural, as Professor Donald Clarke explains in his article, that the GATT members are skeptical about admitting states whose economies are not entirely or primarily market oriented. A few states with nonmarket economies have been admitted, but only after extended negotiation, and in any event these were states with relatively small economies.[7] As Professor Clarke argues, the GATT is premised on the notion that the economies of member states will react in predictable ways to reductions in tariffs and other stimuli. If nonmarket economies do not respond to such stimuli, they may enjoy nonreciprocal advantages under the GATT. If, for example, China reduces its tariffs in accordance with the GATT (in exchange for similar treatment for Chinese exports abroad), Chinese demand may not increase as much as might be the case for a market economy because domestic Chinese demand may not turn entirely on market factors like price. In this event, China would gain the benefits of GATT membership—reduced tariffs by the GATT members on Chinese exports abroad—without accepting the increased imports that one might normally expect resulting from lower domestic tariffs.[8] For a fuller analysis of the economic implications of Chinese

5. *See* GATT, *supra* note 2, at A12, 55 U.N.T.S. at 196.

6. *See, e.g.*, Robert G. Herzstein, *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*, 18 LAW & POL'Y INT'L BUS. 371 (1986) (noting that the GATT Government Procurement Code requires governments to use "published ('transparent') criteria" when purchasing certain categories of goods).

7. *See* RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 253-54 (1991) (describing admission of Poland, Romania, and Hungary).

8. *See id.* at 254 (asserting that an exchange of MFN treatment between nonmarket economy [NME] states and market economy states "favors the NME state").

membership in the GATT, I refer the reader to Professor Clarke's thoughtful and incisive article.

Of course the question of GATT membership for China also has political implications. The GATT is no longer a small club of Western states; more than one hundred states from around the world now take part in the Agreement. The United States itself trades with virtually all of these states, including most of the states of the Pacific Rim, as well as a number of non-GATT states such as China. Quite apart from its economic function, the GATT serves a political function; membership implies some degree of acceptance by the international community.

Indeed, in some ways the debate about Chinese membership in the GATT parallels the more overtly political debate about expanding NATO membership to include Eastern Europe. In both cases, those who advocate caution stress that the candidate for membership may not yet be compatible with the needs of the larger international organization. Thus supporters of President Clinton's "Partnership for Peace" argue that many of the Eastern European states are not militarily prepared to take on the obligations of NATO membership, and that those few that are prepared can be protected by a warmer relationship short of full membership. Similarly, Professor Clarke argues in this issue that China's economy is not yet compatible with the GATT, which assumes that private economic actors within states will respond like rational economic actors to market signals.

Conversely, for both NATO and the GATT, the argument for inclusiveness stresses the need to consolidate gains. For NATO, this means preserving the victories of the post-Cold War era before a new political ice age descends on Europe. For the GATT, this means rewarding the reformers in the Chinese government before the economic hard-liners again seize the day.[9]

9. Parenthetically, I might add that the question of GATT and China is relevant to developments in Europe for another reason. Some observers think the Clinton Administration pays too much attention to Asia and not enough to Europe. *See, e.g.*, Brent Scowcroft & Richard Haass, *Foreign Policy Reaches a Peril Point*, N.Y. TIMES, Jan. 5, 1994, at A15 (criticizing the Administration for "counterproductive suggestions" that Asia is now more important to the United States than Europe); George Walden, *New World, Old Problems*, DAILY TELEGRAPH, Oct. 19, 1993, at 22 (interpreting statements by President Clinton and Secretary Christopher as implying that "America is beginning to see its economic relations with Asia as more important than historic ties with Europe" and noting that in the future European relations with America will be governed by "economic self-interest rather than political sentiment").

I do not mean to push this parallel too far; like most analogies in foreign affairs, it breaks down under pressure.[10] Among other things, the politics of the two issues are quite different. The question of the GATT membership for China has not yet become a front-burner political issue for the United States, the West, or (perhaps most important) the Western media. This may be for the best; the question of Chinese membership in the GATT is probably best left to its economic merits. But it seems unavoidable that politics will play some role in the decision. If so, one might ask whether the GATT membership is a more appropriate tool of U.S. human rights policy than bilateral MFN status. I will return to this question in my comments on the third panel of this Symposium.

In any event, Professor Clarke's piece on GATT membership for China, in which he expresses skepticism about the compatibility of the present Chinese economy with the GATT, is a reasoned and persuasive argument for caution. I commend it to the reader.

B. NAFTA

The most angry critique of the Administration's trade policy comes not from those who fear that the United States is shunning Europe but from those who fear free trade itself. This view was well represented on the NAFTA panel at this Symposium. Robby Stern argued forcefully that NAFTA would throw Americans out of work and encourage exploitation of Mexican workers as U.S. businesses move south to take advantage of cheap labor. Mr. Stern spoke with the passion and anger that seems to be the hallmark of anti-NAFTA oratory. And Professor Robert Benson, another eloquent opponent of NAFTA, argued that free trade is an "extremist ideology." In this issue he repeats this claim and elaborates on his arguments against NAFTA. He casts his critique of NAFTA as a plea for "moderation and conservatism."[11] I suspect that most moderates and conservatives do not share Professor Benson's conception of moderation and conservatism.

---

10. "[P]olicy-makers ordinarily use history badly. When resorting to an analogy, they tend to seize upon the first that comes to mind. They do not search more widely. Nor do they pause to analyze the case, test its fitness, or even ask in what way it might be misleading." ERNEST R. MAY, "LESSONS" OF THE PAST xi (1973).

11. *See* Robert W. Benson, *Free Trade As an Extremist Ideology: The Case of NAFTA*, 17 U. PUGET SOUND L. REV. 555 (1994).

Nonetheless, I am willing to accept Professor Benson's suggestion that free tradism is a form of ideology such that, as he puts it, "[a]ll of us walk the world with ideologies in our heads."[12] But of course not all ideology is wrong. The ideology of liberty and republicanism, embodied in a "sacred"[13] constitutional text, has given us a relatively stable and free system of government for more than two hundred years. The ideology of market capitalism has produced much stronger economic growth and development than the ideology of forced collectivism. As Ms. Rebecca Reynolds Bannister argues in this issue, there certainly is abundant evidence to support the claim that free trade has promoted economic growth.[14]

I also take issue with the suggestion that support of free trade is an extremist view. How are we to measure extremes? If public opinion is to be our guide, then why is there broad support among Americans for free trade in general and NAFTA in particular?[15] If NAFTA was the product of a few extremists, then why did a bipartisan majority in both Houses of Congress vote to endorse it?[16]

This last point, about congressional approval of NAFTA, brings me to the one doctrinal aspect of NAFTA that most needs clarification. Many people have wondered why NAFTA was approved by both Houses of Congress, and not just two thirds of the Senate as appears to be required by the Treaty Clause of Article II of the Constitution.[17] The answer is that NAFTA was an executive agreement, not a full-fledged Article II treaty. An executive agreement is an international agreement concluded by the President without Senate advice and consent. Although the Constitution does not expressly authorize the President to conclude such agreements, the Congress has long since acquiesced in the practice, and a federal statute requires only that

---

12. *Id.*

13. *Cf.* Janet E. Ainsworth, *Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China*, 43 HASTINGS L.J. 273 (1992) (critiquing the application of Western standards of interpretation to Chinese constitutionalism).

14. *See* Rebecca Reynolds Bannister, *The Mexican Market and NAFTA*, 17 U. PUGET SOUND L. REV. 533 (1994).

15. *See, e.g.*, David Lauter, *The Times Poll: Economy and President Seen More Favorably*, L.A. TIMES, Dec. 9, 1993, at A1 (reporting poll results indicating that 41% of Americans support NAFTA while 27% oppose it).

16. *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C.A. § 3301 (West Supp. 1994)).

17. *See* U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

such agreements be reported to the Congress within sixty days of entry into force.[18] Some executive agreements, known as "Presidential" or "sole" executive agreements, are concluded solely on the basis of the President's inherent constitutional power to conduct foreign policy. Others are based on authorization in full-fledged Article II treaties. NAFTA was a "congressional executive agreement"; its negotiation was authorized by the Congress.[19] As an executive agreement, the instrument did not require the Senate's advice and consent to ratification.

But then why did both Houses act on NAFTA if no Senate action was required? The answer appears to be that NAFTA, like most international agreements to which the United States is a party, is not self-executing. That is, it has little or no force in U.S. law until Congress adopts "implementing legislation."[20] When voting on NAFTA, the Senate and House were actually voting on House Bill 3450,[21] a bill to implement the provisions of NAFTA by altering tariffs.[22] As with executive agreements, the Constitution says nothing about "non-self-executing" treaties; indeed, it provides that treaties are the "supreme Law of the Land."[23] It is perhaps understandable that executive agreements, which are not subject to any congressional approval, should be subject to implementing legislation, but many have questioned why treaties approved by the Senate need to be approved again by the entire Congress.[24] And even executive agreements are now subject to a bicameral approval requirement that is arguably more demanding than the sixty-seven votes required by the Treaty Clause. One response is that only Congress can do some things called for by treaties, such as raising taxes or making appropriations. But it is unlikely that Congress has the exclusive power to regulate all matters covered by NAFTA.

In any event, Congress did approve implementing legislation for NAFTA, and so the question of self-execution is now moot, except insofar as it bears on possible abrogation of NAFTA in the future. Opponents of NAFTA suggest that it is a

18. *See* The Case Act, 1 U.S.C. § 112b (1988).

19. *See* 19 U.S.C. §§ 2902(b), 2903 (1988) (authorizing negotiation of certain trade agreements); *The History of the Deal*, CONG. Q., Nov. 20, 1993, at 3180 (describing congressional "fast-track" authority for negotiation of NAFTA).

20. *See* 19 U.S.C. § 2903(a) (1988) (requiring implementing legislation).

21. H.R. 3450, 103d Cong., 1st Sess. (1993).

22. *Id.*

23. U.S. CONST., art. VI, cl. 2 (Supremacy Clause).

24. *See, e.g.*, Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988).

one-way ratchet, a mistake that cannot be undone. The Congress can always modify its implementing legislation to erect new trade barriers or prohibit foreign investment if it wishes to do so in the future.

With that, I leave the reader to Professor Benson and Ms. Bannister.

C. Trade with Japan

The third panel of the Symposium took up a variety of issues related to U.S. trade with Japan. In general, the panelists emphasized the need for greater American understanding of Japanese markets and business customs. Indeed, the panel as a whole seemed less interested in declaring economic war on Japan than in educating Westerners about doing business there. The panelists also expressed skepticism about Japan's image as a mercantilist monolith. The panel members conceded that there is a high degree of partnership between business and government in Japan, but they also stressed the bureaucratic infighting within the government and the fierce competition between firms in the private sector. As Professor Dan Fenno Henderson put it, Japan is not "Japan, Inc."

One panelist, Michael Kawachi of Mayer, Brown and Platt in Tokyo, spoke on securitization in Japan—that is, on the growing market in "receivables" in that country.[25] Mr. Kawachi has been kind enough to develop his thoughts in writing for this issue of the *Review*.[26] In his article he describes the growth of securitization in Japan over the past few years. He notes that the market is less developed there than it is here, and he suggests that growth of the market has been hampered by government regulation. He stresses, for example, the bureaucratic rivalry between the Ministry of Finance and the Ministry of

25. The definition of the term "securitization" is elusive. It can refer broadly to the "creation of marketable securities," as Mr. Kawachi suggests, Michael T. Kawachi, *The New Law of Asset Securitization in Japan*, 17 U. PUGET SOUND L. REV. 587 (1994), or more narrowly to the "pooling of assets and the subsequent sale of interests in the pool to investors," or even more narrowly to the sale of "receivables" arising out of consumer credit transactions, mortgages, or other commercial transactions. *See generally* Robert B. Titus, *Asset Securitization: Marvel of the Marketplace, But Should We Be Uneasy?*, 73 B.U. L. REV. 271, 272-73 (1993) (book review) (providing definitions of varying scope).

For more on securitization generally, see TAMAR FRANKEL, SECURITIZATION: STRUCTURED FINANCING, FINANCIAL ASSETS POOLS, AND ASSET-BACKED SECURITIES (1991 & Supp. 1992); JAMES A. ROSENTHAL & JUAN M. OCAMPO, SECURITIZATION OF CREDIT (1988).

26. *See* Kawachi, *supra* note 25, at 587.

International Trade and Industry, both of which have authority over various segments of the financial markets.[27]

Interestingly, Mr. Kawachi also emphasizes Japanese regulatory custom that interprets silence as prohibition. That is, the absence of regulations or statutes explicitly endorsing securitization has discouraged the development of a market in receivables in Japan because private actors normally look for more explicit forms of approval from the bureaucracy.[28] The American experience is often quite the opposite. In our system, as Mr. Kawachi points out, individuals will on occasion experiment with innovative financial transactions until they are told not to.[29] Our legal system does not ordinarily impose civil or criminal sanctions on an individual or corporation in the absence of a reasonably clear prohibition in positive law.[30]

Despite these obstacles, Japan appears to be moving toward greater securitization. Press reports suggest that Japanese banks "are finally preparing to shed hundreds of billions of dollars in bad real estate loans, employing securitization and individual-asset sales as their primary tools."[31] Indeed, securitization is becoming a significant tool in banks' efforts to deal with debts owed by developing countries.[32] Mr. Kawachi is persuaded that increasing reliance on securitization is efficient; he sees such transactions as "mutually beneficial."[33]

Indeed, securitization may help firms generate capital by selling their receivables, and it may promote risk management because purchasers of debt may pool their resources to acquire

---

27. *See id.* at 604 (describing the two agencies' competing claims to competence in regulation of financial markets).

28. *See id.* at 607 (describing the Japanese custom that no rule means prohibition).

29. *See id.*

30. These differing views on the role of positive law are reflected in international law. International law has traditionally equivocated on whether states may act—for example, by exercising extraterritorial jurisdiction—in the absence of any rule of international law on point. *Compare* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-21 (Sept. 7) (suggesting that a state's exercise of jurisdiction is lawful absent a "rule of international law limiting the freedom of States" to extend their jurisdiction) *with* J. L. BRIERLY, THE LAW OF NATIONS 49-56 (6th ed. 1963) (expressing skepticism about this view).

31. *How the Bank Cleanup Will Work in Japan*, Liquidation Alert, Jan. 31, 1994, *available in* LEXIS, Banking Library, LQALRT file; *see also* Amy Barrett et al., *A Sushi Special for Bottom-Fishers*, BUS. WK., Dec. 27, 1993/Jan. 3, 1994, at 46 (reporting on efforts of Japanese banks to sell U.S. real estate holdings); *Japanese Dump U.S. Real Estate Holdings*, ST. LOUIS POST-DISPATCH, Mar. 19, 1993, at 13D.

32. *See generally* Alfred J. Puchala, Jr., *Securitizing Third World Debt*, 1989 COLUM. BUS. L. REV. 137.

33. Kawachi, *supra* note 25, at 609.

diverse portfolios of receivables.[34] But commentators have identified potential disadvantages to securitization as well. Will securitization in Japan (or in the United States) make it "more difficult for investors to analyze and evaluate" securities they wish to purchase?[35] Will securitization lead to more volatility in financial markets? Does securitization present special potential for fraud or abuse? Are disclosure rules necessary?[36] It will be interesting to see how the Japanese government responds to these concerns.

Finally, does Mr. Kawachi's trenchant observations about securitization in Japan have broader implications for U.S. trade policy? It's hard to tell. After all, this small sector is hardly representative of the Japanese economy as a whole, and even less representative of the enormous transboundary trade in goods and services that so preoccupies the leaders of both countries. Still, the Japanese experience with securitization may help shape our largely unformed law on the subject. Conceivably, it might even lead to greater opportunities for foreign investment in Japan, or at least in Japanese debt. It may also help manage the risk of lending to the developing world, and thus encourage such lending in the future. Securitization is a trend that bears watching.

D. Trade with China

As I mentioned at the outset, this panel addressed itself to a variety of aspects of trade with East Asia, including the function of the APEC conference and opportunities for American firms in Taiwan and the People's Republic of China. Two of the four panelists focused on one relatively specific aspect of our trade relations with China: the renewal of MFN status. Jeffrey Kovar, an attorney-adviser with the U.S. Department of State, introduced the topic by outlining President Clinton's executive order setting forth the standards for decision.[37]

As Mr. Kovar explained, the executive order attaches different consequences to different human rights violations.

34. Joseph C. Slenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers,* 69 TEX. L. REV. 607 (1990) (asserting that securitization promotes adaptability and security for users and suppliers of capital, lower costs of funds for borrowers, alternative sources of capital, and creation of a secondary market).

35. FRANKEL, *supra* note 25, § 4.5, at 135.

36. *See* Titus, *supra* note 25, at 284-85, 285 n.110.

37. *See* Exec. Order No. 12,850, 58 FED. REG. 31,327-28 (1993).

Renewal of MFN status is most directly tied to a showing that China has made progress in permitting free emigration and prohibiting trade in goods produced by prison labor.[38] It is conceivable that ongoing violations of various other civil and political rights might not lead to a denial of MFN status.

Randall Green, an aircraft contracts specialist at Boeing and adjunct professor of law at the University of Puget Sound School of Law, followed Mr. Kovar's presentation by arguing forcefully for renewal of MFN status for China. I agree with Professor Green's conclusion. Denial of MFN status to China would significantly increase tariffs on Chinese exports to the United States, thus denying China access to one of its most important export markets. This development would slow the growth of China's export trade, which would damage China's infant market economy. It's hard to see how a weaker Chinese economy would promote human rights there; it seems more likely to do the opposite. Of course, denial of MFN status also would deprive American consumers of inexpensive goods presently imported from China. Conversely, greater trade with China will encourage economic growth there, which will in turn lead to the growth of a more educated and sophisticated citizenry—the best hope for a more democratic China in the future. Granted, the threat of denial of MFN status has some value, but that value is limited. If such a threat is repeated but never carried out, it loses its credibility. And if it is carried out, the threat and its accompanying leverage disappears.

In my view, human rights can and should be a part of U.S. policy toward China, but U.S. policy should rely on incentives rather than threats. I am not certain whether Professor Green shares this view. He implies that the United States is in no position to accuse China of human rights violations because China's record on "economic and social rights" is superior to that of the United States.[39] I take a different view. I reject the suggestion that China's human rights violations are no worse than those of the United States. The United States by no means has a perfect record of respect for civil and political rights, but the U.S. record certainly compares favorably to that of China, as to which there are credible and persistent reports of torture, arbitrary arrest, restrictions on freedom of speech,

38. *See id.* § 1(a).

39. *See* Randall Green, *Human Rights and Most-Favored-Nation Tariff Rates for Products from the People's Republic of China*, 17 U. PUGET SOUND L. REV. 611 (1994).

press, religion, and travel, to name a few.[40] It is no answer to suggest that civil and political rights are any less fundamental than economic and social rights. I see no reason to maintain that the right not to be tortured or killed is less fundamental than the right to shelter or food.

As for economic and social rights, it is difficult to argue that the average Chinese citizen is economically better off than the average American. For example, China's per capita gross national product is still a fraction of that of the United States; its infant mortality rate is three times as high; and the average life expectancy in China, while significantly higher than in much of the developing world, still lags behind that of the United States.[41] Even assuming that China has a better record on economic and social rights than the United States—say, because it provides its citizens with more governmental largess than does the United States—that fact alone should not preclude the United States from criticizing human rights violations by China, any more than Chinese violations should preclude the Chinese government from criticizing U.S. human rights practices. The problem in today's world is not that governments spend too much time critiquing each other's human rights violations, but that governments all too often look the other way.

Assuming that human rights should play a role in U.S. policy toward China, I suggest that the United States seek alternatives to the rather unwieldy instrument of bilateral MFN status. One possible alternative is to use the U.S. vote in multilateral development banks to deny multilateral financial assistance to China until it reforms its human rights practices. Similarly, the United States should consider human rights before expanding cooperation with China in law enforcement. And human rights should be a factor in assessing a Chinese application for membership in the GATT, at least if GATT membership evolves from a purely economic question to a more overtly political one.[42] In addition, the Clinton Administration should encourage American companies doing business in China

40. *See, e.g.*, AMNESTY INT'L, PEOPLE'S REPUBLIC OF CHINA: CONTINUED PATTERNS OF HUMAN RIGHTS VIOLATIONS IN CHINA, AI INDEX ASA 17/32/92 (1992); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992 540-49 (1993) (describing a wide variety of ongoing human rights violations in China).

41. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992 824, 831 (1992).

42. *See U.S.-China Trade Dispute: Declare Victory Now*, ARIZ. REPUBLIC, Mar. 21, 1994, at B4.

to take up human rights cases with the Chinese government directly.[43] Finally, human rights should be more a part of diplomacy, of day-to-day political discourse between governments. The American President should not be afraid to use the bully pulpit to champion the rights of the oppressed.

IV. CONCLUSION

I said at the outset of this Preface that this Symposium on trade was well timed because it coincided with momentous developments in international trade law. But the timing of this issue of the *Review* is notable for another reason. The Symposium was held three days before the University of Puget Sound publicly announced that it had sold its law school to Seattle University, effective Fall 1994. On August 19, 1994, the University of Puget Sound School of Law will become the Seattle University School of Law, and this law journal will become the *Seattle University Law Review*. Accordingly, the volume you now hold is the final issue of the *University of Puget Sound Law Review*. I join the editors of the *Review* in thanking all of those who have helped the *Review* develop and flourish in its seventeen years of existence, and I look forward to working with a new group of editors as this journal settles into its new home.

43. *See* Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 120 (1993) ("We recommend that foreign companies operating in China 'adopt' the cases of political prisoners held in the regions in which companies' China operations are most substantial."). The authors argue that the foreign business community could have a "considerable impact" in addressing human rights violations in China, and they present a variety of useful suggestions for doing so. *See generally id.*